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In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANCIS LEO CAPPAERT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

STATE OF NEVADA, EX REL. ROLAND D. WESTERGARD, STATE ENGINEER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute and proclamation involved	2
Statement:	
A. Devil's Hole	3
B. The Cappaerts' pumping	6
C. The protest before the State Engineer	8
D. The proceedings below	10
Summary of argument	15
Argument:	
I. The United States, by withdrawing lands from the public domain and reserving them for a Federal use, may reserve unappropriated waters, whether navigable or non-navigable, appurtenant to the land to the extent necessary to fulfill the purpose of the reservation of the land	19
A. The federal reserved right and the principles supporting it are firmly established by decisions of this Court	19
B. The reserved right is not dependent upon state laws or procedures	23
C. The Desert Land Act does not bar the application of the federal reserved rights doctrine to non-navigable waters	25

595-381—75——1

Argument—Continued:

	Page
II. The United States' reserved water right is equally applicable to surface water and ground water	30
A. The reserved right is based on the need of the reservation not the character of the water reserved	30
B. It is now well recognized that groundwater and surface water are interconnected and should be treated similarly by the law	31
C. The courts considering the issue have uniformly supported the application of the reserved rights doctrine to underground water	35
III. The Presidential Proclamation of January 17, 1952 validly established Devil's Hole as a part of Death Valley National Monument and thereby reserved the unappropriated waters necessary to preserve Devil's Hole Pool in its natural condition, including preservation of the fish that live in it	38
A. The President acted within his authority in establishing Devil's Hole as a part of Death Valley National Monument	38
B. The Presidential proclamation reserving Devil's Hole reserved the water rights necessary to preserve the pool and the fish that live in it	40
IV. The defense of *res judicata* cannot be invoked to bar the action by the United States in this case	41
Conclusion	50

CITATIONS

Cases:

	Page
Acton v. *Blundell*, 152 Eng. Rep. 1223	33
Arizona v. *California*, 373 U.S. 546	19, 20, 21, 22, 29
Barnes v. *Sabron*, 10 Nev. 217	35
Bernhard v. *Bank of America Nat. Trust & Savings Ass'n.*, 19 Cal. 2d 807, 122 P. 2d 892	43, 44
Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313	42, 43, 44
Broder v. *Water Co.*, 101 U.S. 274	26
Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393	29–30
California Oregon Power Co. v. *Beaver Portland Cement Co.*, 295 U.S. 142	26, 72
Cameron v. *United States*, 252 U.S. 450	18, 39
City of Los Angeles v. *City of San Fernando*, 123 Cal. Rptr. 537 P. 2d 1250	33, 35
City of Pasadena v. *City of Alhambra*, 33 Cal. 2d 908, 207 P. 2d 17	35
Federal Power Commission v. *Oregon (Pelton Dam)*, 349 U.S. 435	14, 16, 20, 21, 22, 25, 28, 29, 36
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275	36
Jones v. *Adams*, 19 Nev. 78, 6 Pac. 442	34
Meeker v. *City of East Orange*, 77 N.J.L. 623, 74 Atl. 379	34
State of Nevada v. *United States*, 165 F. Supp. 600, affirmed, 279 F. 2d 699	27, 36
State of Nevada ex rel. Shamberger v. *United States*, 165 F. Supp. 680	36
Templeton v. *Pecos Valley Artesian Conservancy District*, 65 N.M. 59, P. 2d 465	33
Train v. *Natural Resources Defense Council*, 121 U.S. 60	39

Cases—Continued Page
Tweedy v. *Texas Co.*, 286 F. Supp. 383 ..... 22, 37
Udall v. *Tallman*, 380 U.S. 1 39
United States v. *Ahtanum Irrigation, Dist.*, 236 F. 2d 321 ..... 19, 27
United States v. *Ballard*, 184 F. Supp. 1 ..... 33, 35
United States v. *California*, 332 U.S. 19 48
United States v. *District Court for Eagle County*, 401 U.S. 520 22
United States v. *McIntire*, 101 F. 2d 650 19
United States v. *Powers*, 305 U.S. 527 ..... 19, 20, 22
United States v. *Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 19
United States v. *Utah Construction & Mining Co.*, 384 U.S. 394 48
United States v. *Walker River Irr. Dist.* 104 F. 2d 334 ..... 19, 27
Waters of Manse Spring, In re 60 Nev. 280, 108 P. 2d 311 35
Winters v. *United States*, 207 U.S. 564 .. 19, 20, 22, 30
Constitution, statutes and proclamation:
Constitution of the United States:
Article I, Sec. 8 ..... 15, 20
Article IV, Sec. 3 ..... 15, 20
Act of July 26, 1866, 14 Stat. 251 26
Act of July 9, 1870, 16 Stat. 217 26
Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. 431 *et seq* 2, 3, 5, 17, 38, 39
Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. 1–3 ..... 6, 41
Act of June 13, 1933, 48 Stat. 139, 16 U.S.C. 447 6
Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. 321 ..... 26, 29
McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666 ..... 15, 21, 36

Constitution, statutes and proclamation—Cont.
Reclamation Act, 44 Stat. 649, as amended, 70 Stat. 524, 43 U.S.C. 423e ..... Page 36
Taylor Grazing Act, 48 Stat. 1269, as amended, 43 U.S.C. 315 *et seq* 29
43 U.S.C. 315b 29
43 U.S.C. 315g(b) 7
28 U.S.C. 1345 ..... 8, 10, 48
Presidential Proclamatln oj January 17, 1952p, 66 Stat. C18, 17 FIk. Reg. 691 ..... 3, 5
Nevada Revised Statutes:
Sec. 533.010–533.060 23
Sec. 55.050 45
Sec. 533.090–320 45
Sec. 533.325 45
Sec. 533.325–533.375 44
Sec. 533.365 45
Sec. 533.380–533.420 45
Sec. 533.425 45
Sec. 533.430 45
Sec. 533.450 45
Sec. 534.020 ..... 23, 33
Sec. 534.080 23
Sec. 534.090 23
Sec. 534.100 45
Sec. 534.110 35
Miscellaneous:
ALI [redacted], Restatement of *Judgments* (1942) 44
Brown, *The Desert Pupfish*, Scientific American (Nov. 1971) 5
Clark, *Arizona Ground Water Law: The Need for Legislation*, 16 Ariz. L. Rev. 799–804 (1974) 26, 33, 34
5 Clark, *Waters and Water Rights* (1972) 24, 25, 34
Comment, *Water Appropriation for Recreation*, 1 Land and Water Review (1966) 24

Miscellaneous—Continued:

	Page
40 Cong. Rec. 7331 (1906)	38
Corker, *Groundwater Law, Management and Administration*, National Water Commission Legal Study No. 6 (1971)	32
2 Davis, Administrative Law Treatise (1958)	44, 48
Dewsnup, *Legal Protection of Instream Water Values*, National Water Commission Legal Study No. 8–A (1971)	24
Goldberg, *Interposition—Wild West Water Style*, 17 Stanford L. Rev. 1–38 (1964)	26
H.R. Rep. No. 2224, 59th Cong., 1st Sess. (1906)	38
James, *Civil Procedure* (1965)	42
Kroeber, *Handbook of the Indians of California* (1970)	31
Morreale, *Federal-State Conflicts Over Western Waters: A Decade of Attempted "Clarifying Legislation,"* 20 Rutgers L. Rev. 423 (1966)	25
Morreale, *Federal-State Rights and Relations* in 2 Clark, *Waters and Water Rights* (1967)	22, 26
Report to the President and to the Congress by the Public Land Law Review Commission on one-third of the Nations Land (1970)	24
Rule 8(c) of the Federal Rules of Civil Procedure	42
S. 28, 92d & 93d Cong., 1st Sess	25
Sax, *Water Law, Planning and Policy—Cases and Materials* (1968)	23, 24
S. Rep. No. 3797, 59th Cong., 1st Sess. (1906)	38
Trelease, *Federal-State Relations in Water Law*—National Water Commission Legal Study No. 5 (1971)	23, 31
Trelease, *Water Law—Resource Use and Environmental Protection* (2d ed.)	33, 34

Miscellaneous—Continued

	Page
Water Policies for the Future—Final Report to the President and to the Congress of the United States by the National Water Commission (1973)	33

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, A–1 to A–17) [1] is reported at 508 F. 2d 313. The find-

[1] "Pet. App." refers to the separately bound appendix to the petition for a writ of certiorari in No. 74–1107; "App." refers to the joint appendix.

595-381—75——2

ings of fact and conclusions of law of the district court (App. 359–368) are reported at 375 F. Supp. 456.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, B–1) was entered on December 4, 1974. The court of appeals' order denying a timely petition for a rehearing (Pet. App. B, B–2) was entered on January 31, 1975. The petition for a writ of certiorari in No. 74–1107 was filed on March 6, 1975, and the petition for a writ of certiorari in No. 74–1304 was filed on April 19, 1975. Both petitions were granted on June 23, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States, by virtue of a Presidential Proclamation declaring Devil's Hole, formerly part of the public domain, to be a national monument, thereby reserved such unappropriated underground waters as are required to preserve the pool of water in Devil's Hole and a species of fish whose sole habitat is that pool.

2. Whether a previous proceeding before the Nevada State Engineer in which federal officials protested the granting of pumping permits bars the United States from bringing this action.

STATUTE AND PROCLAMATION INVOLVED

The Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. 431–433, is reproduced at Pet. App. D, D–1 to D–2. In pertinent part it provides:

> SEC. 2. That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land * * *.

The Presidential Proclamation of January 17, 1952, 66 Stat. C18, 17 Fed. Reg. 691, is reproduced at Pet. App. C, C–1 to C–3.

STATEMENT

A. DEVIL'S HOLE

1. The area of Nevada near Death Valley contains several springs and water holes that are remnants of prehistoric lakes. They have become islands of water in the desert in which small populations of fish have evolved, isolated from one another for thousands of years. These fish, like the birds and animals of the Galapagos Islands studied by Darwin, are important to the study of genetics, evolution, and the adaptation of animals (and man) to harsh environments. See App. 112–113, 154–158, 314–323; Pet. App. C, C–1 to C–2.

One of the major examples of such pools, and the sole habitat of one species of such fish (*Cyprinodon diabolis*, Devil's Hole pupfish), is Devil's Hole, located on public land near Death Valley. Devil's Hole is a desert pool formed in a collapsed limestone cavern. The surface of the pool lies approximately 50 feet below the surrounding land surface and is about 65 feet long by 10 feet wide. The pool is at least several

hundred feet deep, but its exact depth is unknown (Pet. App. A, A-2; Finding 8, App. 361–362). The pool contains a sloping natural shelf, which, under normal conditions, is covered with shallow water and receives sunlight for a few hours each day, permitting growth of algae upon which the fish feed (Findings 12, 14, App. 362–363) and providing a place for the fish to spawn (Finding 14, App. 363). The Devil's Hole pupfish are dependent for survival on this shelf remaining covered with water (Findings 12, 14, App. 362–363).

There are some 24 species of pupfish in the world. The entire population of the species *Cyprinodon diabolis* inhabit Devil's Hole. This species is like other pupfish in that it survives under low oxygen levels, high water temperatures (here 92 degrees Fahrenheit), and high salinity (App. 127, 155). It is unique, even among pupfish, however, because it is the dwarf of the genus, measuring less than an inch in length at maturity. Its life cycle is also uniquely adapted to the difficult circumstance of survival in Devil's Hole. It spawns in shallow water but migrates some 25 to 40 feet in depth daily as the intensity of the sun changes (App. 114–115). Its markings and the lack of territoriality among males, also distinguish it from other pupfish (*ibid.*) The total population of Devil's Hole pupfish at the time of the trial was about 400 (App. 120). Attempts to transplant the fish to other springs or to raise them in captivity have failed (App. 121).[2]

[2] The Cappaerts assert (Br. 9) that there was evidence to show that "the Devil's Hole pupfish have apparently been successfully transplanted to the Hoover Dam refugium." The references cited, however, do not support the contention. For example, Dr. Osborn's testimony (Tr. June 1st and 2nd, 1973, p. 52), relied upon by the Cappaerts, was that "I can't qualify the Hoover Dam Refugium as a successful transplant." And the court specifically found on April 9, 1974, on the basis of substantial evidence (see App. 121), that transplantation "has not to date proven to be a successful alternative" (Finding 27, App. 365).

[3] See also Brown, *The Desert Pupfish*, Scientific American, Nov. 1971, pp. 104–110.

Cyprinodon diabolis was listed by the Secretary of the Interior as an endangered species on March 10, 1967 (32 Fed. Reg. 4001).[3]

2. Recognizing the importance of Devil's Hole, President Truman by Proclamation of January 17, 1952 (Proclamation No. 2961, 66 Stat. C18, 17 Fed. Reg. 691, Pet. App. C, C–1 to C–3), under the authority vested in the President by the Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. 431 (see p. 3, *supra*), withdrew from the public domain the forty-acre tract containing Devil's Hole and made it a detached unit of the Death Valley National Monument. In establishing the addition to the monument the proclamation referred to the land added as "a forty-acre tract of public land in Nevada containing a remarkable underground pool known as Devil's Hole" (Pet. App. C, C–1) and referred to the pool as a "unique subsurface remnant of the prehistoric chain of lakes" in the area as "confirmed by the presence in this pool of a peculiar race of desert fish, * * * found nowhere else in the world [which] evolved only after the gradual drying up of the Death Valley Lake System * * *" (*id.* at C–1 to C–2). The Proclamation

continued by stating that the reservation is made because (*id.* at C–2):

> * * * the said pool is of such outstanding scientific importance that it should be given special protection, and such protection can be best afforded by making the said forty-acre tract containing the pool a part of [Death Valley National Monument].

The addition to the monument was made subject to the provisions of the Act of June 13, 1933, 48 Stat. 139, 16 U.S.C. 447, which allows a limited application of federal mining laws within Death Valley National Monument, and subject "to all valid existing rights" (Pet. App. C, C–2). The proclamation provided for the supervision of the monument to be turned over to the National Park Service as provided in its organic act (Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. 1–3) and acts supplementary there to (Pet. App. C, C–2 to C–3).

B. THE CAPPAERTS' PUMPING

1. The Cappaerts[4] began purchasing land in the Ash Meadows region near Death Valley and Devil's Hole in the 1960's.[5] On October 14, 1969, they obtained

[4] By "the Cappaerts" we refer collectively to petitioners in No. 74–1107, and their predecessor corporation, Spring Meadows, Inc. The petitioners in No. 74–1107 are Francis and Marilyn Cappaert, of Vicksburg, Mississippi, sole remaining stockholders of Spring Meadows, Inc., a Nevada corporation organized in 1966 and dissolved in 1970 (Finding 2, App. 360–361), and B. L. Barnett, their ranch manager (see Finding 5, App. 361).

[5] The exact dates are not in the record but Spring Meadows Inc., was not organized until 1966.

from the United States an additional 5,645.33 acres in the Ash Meadows region by means of a land exchange pursuant to Section 8 of the Taylor Grazing Act (48 Stat. 1272, as amended, 43 U.S.C. 315g(b)) (App. 16–17). No representations concerning water rights were made to the Cappaerts by federal officials involved in the exchange (Pet. App. A, A–10 to A–11) and lands within one mile of Devil's Hole were deleted from the exchange at the request of the National Park Service (App. 179–180).

2. From 1962, when periodic monitoring began, until 1968, when the Cappaerts' pumping began, the pool in Devil's Hole was stable (except for seasonal variations) at a level approximately 1.2 feet below a copper washer used as a reference point (Findings 11, 13, 15, App. 362–363). This was within the normal range for the hole and posed no threat to the survival of its aquatic life. By 1969, however, the water level had dropped to 2.3 feet below the marker, and by 1972 it had dropped to 3.93 feet below (Findings 17–20, App. 363), a level threatening extinction of the Devil's Hole pupfish (Findings 24–25, App. 365).

The wells involved in this litigation are designated numbers 1 through 6 and 16 and 17[6] (Finding 16, App. 363). The Cappaerts drilled and began pumping from wells 1 through 6 in 1968 (App. 15–16, 224) and drilled wells 16 and 17 in the early part of 1972 (App. 15–16, 225).

[6] Wells 16 and 17 are referred to in the complaint as wells 1–A and 1–B (App. 10–14).

C. THE PROTEST BEFORE THE STATE ENGINEER

In April 1970, the Cappaerts applied to the Nevada State Engineer for permits to change the uses and increase their pumping from wells 1 through 6 (see App. 223–224, 283–285). The United States was not a party to these proceedings and was not served with process (Pet. App. A, A–14). In accordance with Nevada law, however, notices of the applications were published so that any interested person might protest the new water use (see Pet. App. A, A–14 n. 9). One private firm protested (App. 282). An official of the National Park Service (Gerard S. Witucki) also filed protests, signing his own name as protestant, but in the body of the protest stating that he did so on behalf of "the National Park Service Western Service Center, Water Resources Section" (App. 269–270; see also App. 271–278).

As a result of the written protests, the State Engineer held a hearing on December 16, 1970. At that hearing (App. 281–313) a field solicitor of the Department of Interior was present, stated that he represented the National Park Service of the Department of Interior, and pointed to the possible detrimental effect on Devil's Hole of the new pumping (App. 286–298). The field solicitor informed the Engineer that the United States was aware of the declining water level of Devil's Hole and had commissioned a hydrological study to try to determine which wells on the Cappaerts' land were hydrologically connected to Devil's Hole and, thus, which could be pumped safely

and which should be limited, and to what degree (App. 291–294).

The field solicitor requested that the Cappaerts' application be denied outright or that the State Engineer postpone his decision on the matter until the pending studies were completed (App. 286–294). While the field solicitor referred to the Presidential Proclamation establishing Devil's Hole as a national monument and stated that the federal government's primary concern was that pumping from the Cappaerts' wells could cause the pool in Devil's Hole to recede and thus endanger the pupfish (App. 286–294), he did not assert that the United States had a reserved water right in respect to Devil's Hole nor did he seek an adjudication of the United States' water rights by the State Engineer.

At the conclusion of the hearing on December 16, 1970 the State Engineer declined to postpone action on the Cappaerts' applications (App. 309–310). He stated that there was no recorded federal water right in respect to Devil's Hole (App. 310), that the testimony indicated that the Cappaerts' pumping would not cause unreasonable lowering of the water table (App. 311), and that the granting of the permit applications, because it would further economic development, would be in the public interest (App. 311–312). He then orally issued his ruling "* * * that the protest to the applications that are the subject of this hearing are overruled and the applications will be issued *subject to existing rights*" (App. 312; emphasis added). The National Park Service did not seek to appeal his action.

595–381—75——3

D. THE PROCEEDINGS BELOW

In August 1971 the United States, invoking 28 U.S.C. 1345,[7] brought this civil action in the United States District Court for the District of Nevada naming Spring Meadows, Inc., B. L. Barnett and others as defendants (R. 1).[8] The complaint alleged that the United States, through the establishment of Devil's Hole as a part of Death Valley National Monument on January 22, 1952, reserved the unappropriated waters appurtenant to the land to the extent necessary for the requirements and purposes of the reservation, and that those rights have a priority date of January 22, 1952 (R. 2–3; see also App. 11–12). The complaint further alleged that the defendants had engaged in heavy pumping from wells specifically designated in the complaint and that this pumping had caused the water level in Devil's Hole to drop to a level threatening the extinction of the Devil's Hole pupfish (R. 3–4; see also App. 12–13). The complaint finally alleged that petitioners had no perfected water right (R. 3; see also App. 12–13) and that irreparable harm would follow unless their pumping from the designated wells were enjoined. The complaint asked the court to determine and decree the water rights of the United States and enjoin defendants from diversions of water detrimental to the rights of the United States (R. 4–5; see also App. 13–14).

[7] Section 1345 provides that "the district courts shall have original jurisdiction of all civil actions, suits or proceedings, commenced by the United States * * *."

[8] "R." refers to the record in the court of appeals.

On June 2, 1972, the United States filed an amended complaint (App. 10–14) specifically naming the petitioners in No. 74–1107 as defendants and adding other specified wells and future diversions from particular areas of land to those to be enjoined to the extent that they conflicted with the prior federal rights.[9]

The Cappaerts' answer (App. 15–17) admitted that their wells draw water from the same aquifers as Devil's Hole, but denied that the reservation of Devil's Hole reserved any waters. The Cappaerts also alleged that their exchange of land with the United States estopped the United States from enjoining their use of water.

The State of Nevada intervened as a party defendant (App. 21) and filed an answer asserting no affirmative defenses but praying that the injunction be denied (App. 18–20). The case was heard on the motion for a preliminary injunction (App. 21–268) and the district court, on June 5, 1973, entered detailed findings of fact and conclusions of law (R. 664–674), later adopted without change[10] as the findings and conclusions of the court in rendering its permanent injunction (App. 359–368).

In addition to the general findings with respect to Devil's Hole and the Cappaerts' pumping that have been recited at pp. 3–7, *supra,* the court found that the Cappaert's pumping from particular wells, which are

[9] The complaint, however, did not seek to enjoin any domestic use of water.

[10] Except in transitional phrases making them applicable to a permanent injunction.

hydraulically connected to Devil's Hole, caused the water level in Devil's Hole to drop (Findings 16–21, App. 363); that "pumpage from the aquifer system in the Ash Meadows area can be regulated so as to produce stabilization of the water level in Devil's Hole at any desired position below its mean natural level of 1.2 feet below the copper washer" (Finding 23(d), App. 364); that neither establishing an artifical shelf nor transplanting the pupfish has proved a successful alternative to preserving the pool at a proper level (Findings 26 and 27, App. 365); that if an injunction is not issued "there is grave danger that the Devil's Hole pupfish may be destroyed, resulting in irreparable injury to the United States" (Finding 30, App. 366); and that all wells identified as affecting Devil's Hole lie within two and one-half miles of Devil's Hole (Finding 31, App. 366).

The district court's conclusions of law were essentially that in establishing Devil's Hole as a national monument the President reserved appurtenant unappropriated waters necessary to the purpose of the reservation, that this purpose included preservation of the pool and the pupfish that live in it, that the federal water rights are superior in time and right to those of the Cappaerts, that no case of estoppel has been made out against the United States, and that the public interest lies in granting the injunction (Conclusions of Law 2–11, App. 366–368).

The court then, on June 5, 1973, entered a preliminary injunction limiting pumping from designated wells so as to return the level of Devil's Hole to not

more than 3.0 feet below the marker. The court also appointed a special master to establish specific pumping limits for the designated wells and to monitor the level of Devil's Hole (R. 675–677).

On petitioners' appeal from the preliminary injunction, the court of appeals at oral argument suggested the desirability of a final judgment in order to expedite the final resolution of the case and, with the consent of counsel, remanded the case for entry of a final order (App. 358–359).

On April 9, 1974, the district court entered its findings of fact, conclusions of law, and final decree permantly enjoining the Cappaerts from pumping ground water in such a manner as to cause the waters in Devil's Hole to recede below the 3.0 foot level and designating the master to monitor compliance (App. 359–369).

On December 4, 1974, the court of appeals unanimously affirmed the decision of the district court (Pet. App. A, A–1 to A–17).[11] After stating the facts as found by the district court (*id.* at A–1 to A–4), the court of appeals reviewed the decisions of this Court establishing the reserved rights doctrine, and the decisions of lower courts considering the doctrine in the con-

[11] The court also remanded the case to the district court to determine whether the facts developed during the pendency of the appeal show that a water level of 3.3 feet below the marker is adequate to preserve the pupfish (*id.* at A–16 to A–17), and directed the court to retain continuing jurisdiction so that it can act promptly "if a change in water level is required to preserve * * * the pupfish" (*id.* at A–17). The pupfish have to this time been preserved and the United States is now having studies made to determine if the 3.3 level is satisfactory on a long-term basis.

text of ground water, and concluded that where it is necessary for the purpose of the reservation the United States "may reserve not only surface water, but also underground water" (*id.* at A–6). The court found that "[t]he fundamental purpose of the reservation of the Devil's Hole pool was to assure that the pool would not suffer changes from its condition at the time the Proclamation was issued in 1952; that condition included the pool's unique inhabitants, the pupfish" (*id.* at A–7). The court further held that under Nevada law the Cappaerts had obtained no water rights except by actual use of the water and that "neither the Cappaerts nor their predecessors made actual beneficial use of water until 1968" (*id.* at A–10), well after the establishment of Devil's Hole as a national monument. The court rejected, both factually and on legal grounds, the Cappaerts' argument that the government was estopped from asserting its right because of its exchange of land with the Cappaerts (*id.* at A–11).

Referring to this Court's decision in *Federal Power Commission* v. *Oregon* (*Pelton Dam*), 349 U.S. 435, 444, 448, the court also rejected Nevada's contention, based on the Desert Land Act, that the Devil's Hole water right was invalid because the government had not complied with state law (Pet. App. A, A–11 to A–12). Finally, the court rejected Nevada's contention that the unsuccessful protest before the State Engineer barred this proceeding under the doctrine of *res judicata*. The court explained that the United States had not waived sovereign immunity by the

protest, and that the hearing before the Engineer, not being a general adjudication, and providing for no service on the United States, was not one in which the McCarran Amendment, 66 Stat. 560, 43 U.S.C 666, constituted a congressional waiver of immunity. The court further reasoned that even if the United States had waived sovereign immunity it would be improper to give *res judicata* effect with respect to federal rights to the decision of the state water engineer in a proceeding of this kind (*id.* at A–16).[12]

SUMMARY OF ARGUMENT

I

The decisions of this Court establish that the United States, by reserving public lands, may thereby reserve unappropriated waters appertaining to the land and necessary to fulfill the purpose of the reservation. The power to make such reservations of water rests on the Property Clause, Art. IV, Sec. 3, of the Constitution, and, for navigable waters, additionally on the Commerce Clause, Art. I, Sec. 8. The reserved right is applicable to any federal reservation of land, not just Indian reservations. The right is limited, however, in that it applies only to waters that were unappropriated at the time the reservation was set aside, and is further limited in that it reserves waters only to the extent needed to satisfy the purpose of the reservation.

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[12] The court of appeals, on January 31, 1975, denied a timely petition for rehearing (Pet. App. B, B–2).

The federal reserved right is independent of state laws and procedures. The water law of most Western States is based on the doctrine of prior appropriation. The basic principle of that system is that a water right is obtained by diverting the water from its natural source and putting it to beneficial use. That system, which encourages maximum present exploitation of the water, is peculiarly inappropriate for the protection of National Parks, Forests, and Monuments, where no diversion or beneficial use recognized by the State may be desired, or for Indian reservations or military establishments, where present maximum use may not be desirable or practical. Thus the federal system to protect federal uses fulfills a necessary function and Congress has consistently declined to adopt legislation that would subject such rights to state law.

Petitioners argue that the Desert Land Act granted control over all non-navigable waters (and thus over underground water as well) to the States. The Act provided that patents on the public domain carry with them no water rights and allow States to regulate the water rights of patentees. But the Act does not affect the water rights of the United States appurtenant to lands that it has reserved for federal uses. This Court specifically so held in *Federal Power Commission* v. *Oregon,* 349 U.S. 435. The Cappaerts urge the Court to overrule that case, but the assumption on which they base their argument—that various acts and precedents were there overlooked by the Court majority—is not correct.

II

The reserved right doctrine properly applies to underground water as well as to surface water. The doctrine is based on the need for water to fulfill the purpose of the reservation and not the character of the water. There is no reason, for instance, why the wells on which an Indian or military reservation depends should not be as fully protected as surface diversions.

Moreover, it is increasingly recognized today that ground water and surface water are interlocking resources, part of the same hydrologic cycle, and should be treated similarly by the law. The leading authorities on water law recognize this, and the National Water Commission has recommended the integration of ground water and surface water rights. Moreover, Nevada, by statute, allows appropriative rights in either ground water or surface water.

The decisions below, recognizing the United States' prior water right and enjoining the Cappaerts from interfering with it, are in accord with the only other decisions considering the reserved water rights of the United States to underground water.

III

Contrary to petitioners' arguments, President Truman acted within the authority granted him by the American Antiquities Act, Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. 431 *et seq.,* in reserving Devil's Hole as a National Monument. The terms of the Act grant the President authority to reserve not only

595-381—75——4

historic and prehistoric structures, but also "other objects of historic or scientific interest" situated upon public land, which Devil's Hole clearly is. This Court, in upholding the establishment of the Grand Canyon National Monument, *Cameron* v. *United States,* 252 U.S. 450, 455–456, held that the Antiquities Act is applicable to the preservation of objects of scientific interest as well as man-made antiquities.

As the courts below held, in establishing Devil's Hole as a National Monument a principal purpose was to preserve the pool in its natural state including protection of the Devil's Hole pupfish. This purpose supports the reservation of unappropriated waters appurtenant to the land to the extent necessary to preserve the pool and fish.

IV

Contrary to petitioners' contentions, the State Engineer's granting of pumping permits for some, but not all, of the wells at issue here over the protest of the National Park Service does not bar this action. The Cappaerts have not properly raised the issue of *res judicata,* which is an affirmative defense, and Nevada, which was not a party in the proceeding before the State Engineer, may not do so. But in any event the State Engineer did not purport to adjudicate the water rights of the United States and he was, moreover, precluded from doing so by Nevada law, which required his determination to be subject to existing rights.

After the permit proceeding, when the effect of the increased pumping permitted by the State Engineer

was known, rather than merely predicted, the United States properly brought this action in federal court to determine its water right created by federal law and to enjoin the Cappaerts' pumping to the extent necessary to protect the national monument.

ARGUMENT

I

THE UNITED STATES, BY WITHDRAWING LANDS FROM THE PUBLIC DOMAIN AND RESERVING THEM FOR A FEDERAL USE, MAY RESERVE UNAPPROPRIATED WATERS, WHETHER NAVIGABLE OR NON-NAVIGABLE, APPURTENANT TO THE LAND TO THE EXTENT NECESSARY TO FULFILL THE PURPOSE OF THE RESERVATION OF THE LAND

A. THE FEDERAL RESERVED RIGHT AND THE PRINCIPLES SUPPORTING IT ARE FIRMLY ESTABLISHED BY DECISIONS OF THIS COURT

The decisions of this Court establish that the United States may, by reservation of public lands, also reserve such appurtenant unappropriated waters as are required to accomplish the purposes for which the federal reservation was created. *Arizona* v. *California,* 373 U.S. 546, 597–602; *United States* v. *Powers,* 305 U.S. 527, 528; *Winters* v. *United States,* 207 U.S. 564, 575–578; see also *United States* v. *Rio Grande Dam and Irrigation Co.,* 174 U.S. 690, 703, 706; *United States* v. *Ahtanum Irrigation Dist.,* 236 F. 2d 321, 323–328 (C.A. 9), certiorari denied, 352 U.S. 988; *United States* v. *Walker River Irr. Dist.,* 104 F. 2d 334 (C.A. 9); *United States* v. *McIntire,* 101 F. 2d 650 (C.A. 9). The basis of the doctrine is

that the reservation of public lands for a public purpose implies the reservation of unappropriated, and thus available, water appurtenant to the land to the extent necessary to fulfill that purpose. As the Court has noted, in arid areas the reservation of land will often be of little use without the water rights appurtenant to the land. *Winters* v. *United States, supra,* 207 U.S. at 576; *Arizona* v. *California, supra,* 373 U.S. at 599–601.

The power to make such a reservation rests on the Property Clause, Art. IV, Sec. 3, of the Constitution and, as to navigable waters, also on the Commerce Clause, Art. 1, Sec. 8. And there can be "no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property." *Arizona* v. *California, supra,* 373 U.S. at 598.

Because the right is a federal right derived from the federal reservation of the land, it is not dependent upon state law. The test to be applied to determine the existence of such a federal reserved water right is not compliance with state law but whether the previously unappropriated waters were necessary to accomplish the purposes for which the reservation was created. *Winters* v. *United States, supra,* 207 U.S. at 576; *Federal Power Commission* v. *Oregon* (*Pelton Dam*), *supra,* 349 U.S. at 444–448; *Arizona* v. *California, supra,* 373 U.S. at 599–601. (See also discussion at pp. 23–25 *infra.*)

While *Winters* v. *United States, supra,* and *United States* v. *Powers, supra,* involved Indian Reservations, the doctrine applies equally to any reservation of pub-

lic land,[13] and in *Arizona* v. *California, supra,* this Court specifically so held, stating (373 U.S. at 601):

> The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.[14]

Since the doctrine is based on the need for the otherwise unappropriated water to make the reservation of public land useful and since the waters reserved are those appurtenant to the public land reserved, the reservation is not dependent upon the navigability of the water. In both *Winters* v. *United*

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[13] This is not to say that Indian water rights and federal water rights are one and the same. Indian water rights belong to the Indians rather than to the United States, which holds them only as trustee. For this reason, among others, the United States has taken the position that Indian reserved water rights are not covered by the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666. See our brief in Nos. 74–940 and 74–949. *Colorado River Water Conservation District, et al.* v. *United States* and *Mary Akin et al.* v. *United States*, which we are making available to the petitioners herein. But reserved rights are created by the reservation of any public land, not just reservations of land by or for Indians.

[14] This was in accord with the Court's prior holding in *Federal Power Commission* v. *Oregon* (*Pelton Dam*), *supra*, 349 U.S. at 438, 448 that a reservation of land for a power site reserved appurtenant water rights.

States, supra, 207 U.S. at 566, 577, and *United States* v. *Powers, supra,* 305 U.S. at 528, the source of the waters reserved was a non-navigable stream. See also *Federal Power Commission* v. *Oregon, supra,* 349 U.S. at 438, n. 4, and the discussion at pp. 25–30, *infra.*

However, because the right applies only to waters that are unappropriated at the time the public land is reserved, the United States' right is subordinate to rights perfected before the establishment of the reservation. In turn, rights perfected after the establishment of the reservation are subordinate to the reserved right of the United States. *Arizona* v. *California, supra,* 373 U.S. at 600; see also Morreale, *Federal-State Rights and Relations,* in 2 Clark, *Waters and Water Rights* 81–82 (1967). Moreover, although the reserved right includes future water needs to fulfill the purpose of the reservation, it is also limited by those needs, and the extent of the right can be quantified accordingly. *Arizona* v. *California, supra,* 373 U.S. at 600–601.[15]

In sum, as the Court stated in *United States* v. *District Court for Eagle County,* 401 U.S. 520, 522–523:

> It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona* v. *California,* 373 U.S. 546, the Federal Government had the authority both before and after a State is admitted into the Union "to reserve waters for the use and benefit of federally reserved lands." *Id.,* at 597. The federally reserved lands include any federal enclave. In *Arizona* v. *California* we were primarily concerned with Indian reservations. *Id.,* at 598–601. The reservation of waters may be only implied and the amount will reflect the nature of the federal enclave. *Id.,* at 600–601.

[15] While the right reserves use of up to a certain amount of water, if that amount is not actually used and is replenishable others are free to use it, but on the condition that they will curtail their use if the water is needed for the reservation. See Morreale, *supra,* in 2 Clark, *Waters and Water Rights* 81–82 (1967); see also *Tweedy* v. *Texas Co.,* 286 F. Supp. 383, 386 (D. Mont.).

B. THE RESERVED RIGHT IS NOT DEPENDENT UPON STATE LAWS OR PROCEDURES

Most western states, including Nevada, have water laws based on some version of the doctrine of prior appropriation. The basic principle of such laws is that a person acquires a right to the use of water by diverting it from its source and putting it to a beneficial use. The right to use the water is lost if it is not used and others are then free to appropriate and gain a superior legal right to the use of the water.[16] Nevada uses the prior appropriation system for both surface and underground water. See Pet. App. A, A–8 to A–10. See also Nev. Rev. Stat. 533.010–533.060, 534.020, 534.080, 534.090.

This system obviously encourages maximum present exploitation of the water because a person who does not divert and use water (or transfer his right to an-

[16] See Sax, *Water Law, Planning and Policy—Cases and Materials,* 218–224 (1968); see also Trelease, *Federal-State Relations in Water Law,* National Water Commission Legal Study No. 5 21–38 (1971); 5 Clark, *Waters and Water Rights* 1–37 (1972).

other to do so) loses his right to the water. On the other hand, the system provides little protection for the preservation of waters without diversion or the reservation of water rights for future use. The prior appropriation system in its strict form is thus inappropriate for the protection of National Parks, Forests, and Monuments, where the desirable use of the water may be to preserve it without diversion, or for Indian Reservations or military establishments, where for diverse reasons present maximum exploitation is neither feasible nor desirable.

As stated in the Report to the President and to the Congress by the Public Land Law Review Commission, One Third of the Nation's Land 146 (1970):[17]

> Although state law appears to be generally adequate as a basis for water rights for uses on reserved public lands, the reservation doctrine should not be abrogated. To do so and to require the public land agencies to rely solely on state law for the acquisition of water rights for reserved land uses presents several problems:
>
> (1) In some states important Federal uses, such as for recreation or fish and wildlife purposes, are either not recognized

[17] Western states have increasingly recognized the need to protect some streams in their natural states, contrary to the principles of appropriative rights, which protects only diversions, and to provide some means of reserving water rights for their burgeoning cities. See Sax, *supra*, at 220–221, 185–187; Comment, *Water Appropriation for Recreation*, 1 Land and Water Law Review 209–222 (1966). See also 5 Clark, *Waters and Water Rights* 66–73, 95–98 (1972); Dewsnup, *Legal Protection of Instream Water Values*, National Water Commission Legal Study No. 8–A (1971).

> as beneficial uses or have low preferences vis-a-vis other competing uses.
>
> (2) The implied reservation doctrine provides the necessary water rights for certain Federal uses and future needs for which state law has not been complied with for one reason or another. To discard the reservation doctrine might well place the validity of those rights in question and inject further uncertainty into this area.

Thus, the federal system to protect federal uses fulfills a necessary function. And, since this Court's 1955 decision in *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (see pp. 27–28, *infra*), numerous bills have been introduced in Congress to subject federal water uses to state appropriation doctrines,[18] none of these has been enacted.

C. THE FEDERAL LAND ACT DOES NOT BAR THE APPLICATION OF THE FEDERAL RESERVED RIGHTS DOCTRINE TO NON-NAVIGABLE WATERS

Both petitioners argue (Cappaerts Br. 29–51; Nevada Br. 8–20), that at least as to non-navigable water (which would include Devil's Hole), state law, rather than federal law, should determine the federal water right. The argument is based on an interpretation of the Desert Land Act of 1877, 19 Stat.

[18] For a discussion of some of these bills see Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 Rutgers L. Rev. 423 (1966); see also 5 Clark, *Waters and Water Rights* 383 (1972). The most recent of these bills appears to be S. 28, 92d Cong., 1st Sess., introduced by Senator Moss and others on January 25, 1971, and reintroduced under the same number, 93d Cong., 1st Sess. (January 4, 1973). No action has been taken on the bill.

377, 43 U.S.C. 321, and its statutory predecessors,[19] which petitioners contend severed all non-navigable waters from public land, whether reserved or not, and thereby subjected such waters to state appropriation law. The argument has been made in the past and has been consistently rejected.[20]

The Desert Land Act by its terms applies to persons who homestead desert areas of the public domain. It provides (43 U.S.C. 321) that a patent to such land does not convey water rights, but that water rights "shall depend upon bona fide prior appropriation * * *." It also provides that unappropriated waters "shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." The Act merely adopted local law and customs as the basis for acquisition by the public of rights to the use of unappropriated waters on the public lands. See *Broder* v. *Water Co.*, 101 U.S. 274, 275; *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 154–155. Nothing in the Act purported to limit the water rights of the United States appurtenant to lands it did not open for homesteading—that

[19] Act of July 26, 1866, 14 Stat. 251, and Act of July 9, 1870, 16 Stat. 217, the relevant provisions of which are reproduced in the Cappaerts' brief at pages 91–92.

[20] See Morreale, *Federal-State Rights and Relations* in 2 Clark, *Waters and Water Rights* 58–63 (1967); Goldberg, *Interposition—Wild West Water Style*, 17 Stanford L. Rev. 1–38 (1964); see also Clark, *Arizona Ground Water Law: The Need for Legislation*, 16 Ariz. L. Rev. 799, 804 1974).

is, to lands removed from the public domain and reserved for other purposes.[21]

Any doubt about whether the Desert Land Act had deprived the federal government of its authority to

[21] *California Oregon Power Co.*, *supra*, relied upon by petitioners, is not to the contrary. There, in a case between private parties in which the United States did not participate, one landowner claimed that by virtue of its 1885 patent to riparian property it had acquired common law riparian rights to the waters of a non-navigable stream superior to rights claimed by the other party through subsequent appropriation. In rejecting this claim, the Court stated that by enactment of the Desert Land Act and its predecessors, Congress effected a severance from the land of all non-navigable waters on the public domain and, as a consequence, the patent carried with it no common law riparian rights. Hence, persons asserting water rights in the desert-land States were required to perfect those rights pursuant to applicable state law. By its interpretation of the Act the Court did not, however, purport to limit the power of the federal government to reserve unappropriated water for its own use in the desert-land States.

Four years after the *California Oregon Power Co.* decision, the court of appeals for the Ninth Circuit, in upholding a reserved right to non-navigable waters claimed by the United States for an Indian reservation, expressly rejected the argument that the Desert Land Act obligated the federal government to perfect its right to non-navigable waters in accordance with local law. *United States* v. *Walker River Irr. Dist.*, 104 F. 2d 334. The court stated (*id.* at 336–337):

"It is of course well settled that private rights in the waters of non-navigable streams on the public domain are measured by local customs, laws and judicial decisions. * * * But it does not follow that the Government may not, independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain if needed for governmental purposes."

See also *United States* v. *Ahtanum Irrigation Dist.*, *supra*, 236 F. 2d at 328; *State of Nevada* v. *United States*, 165 F. Supp. 600 (D. Nev.), affirmed on other grounds, 279 F. 2d 699 (C.A. 9).

reserve unappropriated non-navigable waters without regard to state water laws, was dispelled by this Court in *Federal Power Commission* v. *Oregon* (*Pelton Dam*), 349 U.S. 435. In that case, Oregon, relied on the Desert Land Act in asserting that the Federal Power Commission lacked authority to license a dam on a non-navigable river in contravention of state law. The dam was at a location reserved by the United States for water power purposes. The Court rejected Oregon's argument, stating (349 U.S. at 448):

> It is not necessary for us, in the instant case, to pass upon the question whether this legislation constitutes the express delegation or conveyance of power that is claimed by the State, because these Acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers "sources of water supply upon the public lands . . . ." The lands before us in this case are not "public lands" but "reservations." * * * "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose." *United States* v. *O'Donnell*, 303 U.S. 501, 510. See also, *United States* v. *Minnesota*, 270 U.S. 181, 206.

Recognizing that *Pelton Dam* is directly contrary to their argument, the Cappaerts contend (Br. 37–45) that the decision should be overruled.[22] They assert,

[22] Nevada does not join in this argument.

that in deciding *Pelton Dam* the Court acted under a mistake of fact in that it did not refer to President Roosevelt's withdrawal of most public land from availability for homesteading under the Taylor Grazing Act, 48 Stat. 1269, 43 U.S.C. 315, and that the Court overlooked portions of its earlier rulings. But the Court in *Pelton Dam* was engaged in statutory interpretation and the Taylor Grazing Act, enacted in 1934, did not alter what Congress meant in the Desert Land Act of 1877.[23] Moreover, petitioners' reliance on the dissenting opinion in *Pelton Dam*, which presented their argument about the Desert Land Act, refutes their contention that the Court there must have overlooked language in previous decisions that petitioners now invoke in this case. In short, petitioners have offered no persuasive reasons why the Court should overrule its prior interpretation of the Desert Land Act.[24] See *Burnet* v. *Coronado Oil & Gas Co.*,

[23] Moreover, the Taylor Grazing Act did not affect water rights; 48 Stat. 1271, 43 U.S.C. 315b, provides: "That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting public lands or which may be hereafter initiated or acquired and maintained in accordance with such law."

[24] The effect of the Desert Land Act on the government's reserved rights to non-navigable waters was raised before this Court again in *Arizona* v. *California*, *supra*. See Brief in Support of Findings of Fact and Conclusions of Law Proposed by the United States, No. 9 Original, October Term 1959, at 56–61; Rebuttal Brief of the United States, No. 9 Original, October Term 1959, at 1–7; Reply Brief of the United States, No. 9 Original, October Term 1959, at 28–35.

285 U.S. 393, 406. The law in this respect has been settled for twenty years and if it should be changed that is a matter for Congress, which has thus far declined to act. See p. 25, *supra.*

II

THE UNITED STATES' RESERVED WATER RIGHT IS EQUALLY APPLICABLE TO SURFACE WATER AND GROUND WATER

Nevada urges the Court to refuse to "extend" the reserved right doctrine to underground water (Br. 27–33). But the reason for the right requires that it apply to underground as well as surface waters. Moreover, the nature of underground water, its relationship to surface water and the laws affecting each, far from militating against such application, support treating the two sources alike. Every court that has considered the matter—all located in arid areas—has agreed that the right is equally applicable to surface and underground water.

A. THE RESERVED RIGHT IS BASED ON THE NEED OF THE RESERVATION NOT THE CHARACTER OF THE WATER RESERVED

The reserved right, as we have pointed out, is not based on navigability or some other characteristic of the water, but on the initial possession of the land in question by the United States and its reservation for a purpose requiring the use of unappropriated waters. In reserving the land it is assumed that the United States intends to reserve the unappropriated water rights needed to fulfill the purpose of the reservation.

In *Winters* v. *United States, supra,* the Court rec-

ognized the tacit reservation of waters from a non-navigable stream and sustained an injunction barring diversions by up-stream land owners. The Court said (207 U.S. at 576): "The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians * * *"—a contention the Court rejected. If, rather than depending on a non-navigable stream for irrigation, the Indians had depended on wells, as is often the situation in Arizona and Nevada,[25] there would be no reason that their right to draw water from those wells should not be as fully protected as their right to draw water from a stream. The reservation would be equally as useless without the wells and the government's intent to reserve their use would be equally as clear. Similarly, it should not matter whether the water reserved for a federal use is interfered with by a surface diversion or by a well. The effect on the reserved land (no water available for its use) and the diverter (obtaining the use of water previously spoken for) is the same.

B. IT IS NOW WELL RECOGNIZED THAT GROUNDWATER AND SURFACE WATER ARE INTERCONNECTED AND SHOULD BE TREATED SIMILARLY BY THE LAW

Ground water and surface water are interlocking resources, part of the same hydrologic cycle, and should be treated similarly by the law. As a study for

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[25] See Trelease, *supra*, Legal Study No. 5, note 16, at 312, n. 110. For historic instances of Indian dependence on groundwater, see Kroeber, *Handbook of the Indians of California* 590, 694, 722 (1970).

the National Water Commission states (Corker, *Groundwater Law, Management and Administration*, National Water Commission Legal Study No. 6, pp. xxiv–xxv (1971), hereinafter "Corker"):

> Groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle. Groundwater basins feed and are fed by surface streams. Surface water and groundwater are interchangeable for most purposes. Wells deplete surface streams. Depletion of surface streams depletes water supply to wells. Optimum utilization of ground and surface water usually involves conjunctive operation by which stored ground water supplements and firms up the supply of intermittently available stream water. *Different rules of law dependent on the surface or underground point of diversion promote and perpetuate misallocation of the resource.*[26] [Emphasis added.]

The present case illustrates the interrelationship between ground and surface water. Although Devil's Hole is perhaps best classified as surface water because it is a standing pool open to the sky, not water flowing through the interstices of porous rock, it could also be classified as ground water. See Corker, *supra*, at 44–45. Regardless of classification, however, its level is reduced by pumping from nearby wells.

The interrelationship of surface and underground water is now increasingly recognized in the laws and decisions of Western States. See Nev. Rev. Stat.

[26] See also *id.* at 146–157. We are lodging a copy of the Corker study with the Clerk of this Court. For a lucid account of the hydrology of ground water see Corker, *supra*, at 37–97 (*A Layman's Guide to Groundwater Hydrology*).

534.020 cited at p. 23, *supra*. See also *Templeton* v. *Pecos Valley Artesian Conservancy District*, 65 N.M. 59, 332 P. 2d 465 (Sup. Ct.), reproduced in part in Trelease, *Water Law—Resource Use and Environmental Protection* 543–546 (2d ed.); *City of Los Angeles* v. *City of San Fernando*, 123 Cal. Rptr. 1, 537 P. 2d 1250, 1281–1284 (Sup. Ct.); *United States* v. *Ballard*, 184 F. Supp. 1 (D. N.M.); Clark, *Arizona Ground Water Law: The Need for Legislation*, 16 Ariz. L. Rev. 799, 800–801 (1974). And the National Water Commission has recommended (Final Report at 233):[27]

> Recommendation No. 7–1: State laws should recognize and take account of the substantial interrelation of surface water and ground water. Rights in both sources of supply should be integrated, and uses should be administered and managed conjunctively. There should not be separate codifications of surface water law and ground water law; the law of waters should be a single, integrated body of jurisprudence.

Nevada argues (Br. 27–33), however, that it is difficult to determine the source and movement of groundwater and that consequently it is inappropriate to recognize a reserved right in such water. This argument, if accepted, would require that no appropriative right in ground water be recognized, in essence that the law return to the doctrine of *Acton* v. *Blundell*, 152 Eng. Rep. 1223 (Ex. Chamber), in which the court

[27] *Water Policies for the Future*—Final Report to the President and to the Congress of the United States by the National Water Commission (1973).

assumed that the flow of groundwater was not subject to proof and concluded that each landowner was therefore entitled to draw such water as he wished from his wells without regard for the consequences to neighboring owners. But this doctrine has been broadly rejected in America,[28] particularly in the West. Nevada was one of the early states to reject the common law of water rights (*Jones* v. *Adams*, 19 Nev. 78, 6 Pac. 442 (Sup. Ct.)), and Nevada statutory law, as indicated above, recognizes and protects appropriative rights to groundwater (see p. 23, *supra*).

Moreover, the factual premise of Nevada's argument does not exist in this case. Here the United States did not seek to enjoin the Cappaerts' pumping until hydrological studies showed that it was in fact their pumping that lowered the water level in Devil's Hole and until it could show the particular wells that did so. Moreover, far from affecting wells at some unforeseeable distance, as Nevada suggests (Br. 27–28), the only wells enjoined were specifically designated wells within two and one-half miles of the Monument (see p. 12, *supra*). The district court tailored its injunction to curtail pumping even from those wells only to the extent needed to preserve an adequate water level at

[28] See *Mecker* v. *City of East Orange*, 77 N.J.L. 623, 74 Atl. 379 (Court of Errors and Appeals), reproduced in part in Trelease, *Water Law—Resource Use and Environmental Protection* 461–465 (2d ed.); 5 Clark, *Waters and Water Rights* 407–416 (1972). In the West, apparently only Arizona and Texas still allow groundwater, in some circumstances, to be pumped without regard to the effect on neighboring landowners. See Clark, *Arizona Ground Water Law: The Need for Legislation*, 16 Ariz. L. Rev. 799 (1974); Trelease, *supra*, at 467.

Devil's Hole. In this respect the case is no different than if the Cappaerts had established a water right, and their neighbors some years later drilled wells near their property line and so reduced their water level that their wells could no longer draw—in which event petitioners would scarcely argue that the vagaries of the flow of underground water would make an injunction by the earlier user inappropriate.[29]

C. THE COURTS CONSIDERING THE ISSUE HAVE UNIFORMLY SUPPORTED THE APPLICATION OF THE RESERVED RIGHTS DOCTRINE TO UNDERGROUND WATER

In this case, both the district court and the court of appeals, which were doubtless familiar with water rights and water problems in the West, held that the government's reserved right extended to underground water and that the Cappaerts had infringed that right. While there has been very little prior litigation dealing directly with the applicability of the reserved rights doctrine to underground water, the two decisions that have touched on the matter are both in accord with the decision below. Neither is controlling here, but the reasoning in each supports the federal right.[30]

[29] See Nev. Rev. Stat. 534.110; *In re Waters of Manse Spring*, 60 Nev. 280, 286, 108 P. 2d 311, 314; *Barnes* v. *Sabron*, 10 Nev. 217. See also *City of Los Angeles* v. *City of San Fernando*, *supra*, 537 P. 2d at 1314–1317; *City of Pasadena* v. *City of Alhambra*, 33 Cal. 2d 908, 207 P. 2d 17 (Sup. Ct.).

[30] See also *United States* v. *Ballard*, *supra*. In *Ballard* the court was concerned with appropriated rights predating the establishment of Carlsbad Caverns National Park (some of which had

The District Court for Nevada held in a suit brought by the State Engineer that the United States' right to operate wells on the Hawthorne Naval Ammunition Depot in Nevada, was a question of federal law independent of state requirements and that the United States did not need permits from the State of Nevada to do so. *State of Nevada ex rel. Shamberger* v. *United States,* 165 F. Supp. 600. The court relied principally on the Nevada Enabling Act, which disclaimed jurisdiction over federal reservations, on the supremacy of federal law as to the requirements of federal installations, and on this Court's decisions in *Pelton Dam, supra,* and *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275.[31] The court rejected arguments similar to those made by the Cappaerts that the Desert Land Act transferred control to the State of the underground water involved and stressed the national defense aspect of the case.[32]

In 1968, in a suit in the federal Distirct Court for Montana by a surface lessee of land on the Blackfeet

been purchased by the United States), not reserved rights; but the court clearly recognized the interdependence of surface and groundwater uses and that federal rights are determined by federal law.

[31] In *Ivanhoe* the Court upheld the federal requirement that contracts for purchases of water from the reclamation projects at issue contain acreage limitations as provided in Section 5 of the Reclamation Act of 1902 (44 Stat. 649, as amended, 70 Stat. 524, 43 U.S.C. 423e).

[32] The court of appeals affirmed, 279 F. 2d 699, on the basis that because there were no adverse claimants the suit was not one as to which the McCarran Amendment (43 U.S.C. 666) applied and the United States accordingly had not consented to suit.

Indian Reservation, the lessee claimed that a mineral lessee infringed his water rights. The court found that the establishment of the reservation reserved underground waters to the same extent, and with the same limitations, as surface waters. *Tweedy* v. *Texas Co.,* 286 F. Supp. 383, 386. The court held (286 F. Supp. at 385):

> The *Winters* case dealt only with the surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid—water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference.

But the court found no actual infringement under the facts of the case, emphasizing that the reserved right, unless a permanent depletion of the water source is threatened, does not prohibit use by others of waters not actually being used for purposes of the reservation at the time.[33]

We attribute no more controlling authority to these cases than do the petitioners. But, together with the decisions below, they illustrate the consensus of courts considering the matter that the reservation of land for a federal use reserves rights to the underground water necessary for the purpose of the reservation, independant of state law.

[33] 286 F. Supp. at 386.

III

THE PRESIDENTIAL PROCLAMATION OF JANUARY 17, 1952 VALIDLY ESTABLISHED DEVIL'S HOLE AS A PART OF DEATH VALLEY NATIONAL MONUMENT AND THEREBY RESERVED THE UNAPPROPRIATED WATERS NECESSARY TO PRESERVE DEVIL'S HOLE POOL IN ITS NATURAL CONDITION, INCLUDING PRESERVATION OF THE FISH THAT LIVE IN IT

A. THE PRESIDENT ACTED WITHIN HIS AUTHORITY IN ESTABLISHING DEVIL'S HOLE AS A PART OF DEATH VALLEY NATIONAL MONUMENT

The Cappaerts argue (Br. 64–73) that under the American Antiquities Act, Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. 431 *et seq.*, the President's only authority is to reserve federal lands for the purpose of protecting archeologic sites, and that the President may not attempt to reserve lands for other purposes. But the terms of the Act specifically authorize the President, at his discretion, to proclaim as national monuments "historic landmarks, historic and prehistoric structures, *and other objects of historic or scientific interest* that are situated upon the lands owned or controlled by the Government of the United States * * *." (Emphasis added.) It can hardly be doubted that Devil's Hole and the pupfish are "objects of * * * scientific interest" so situated (see pp. 3–6 *supra*).

The brief legislative history of the Antiquities Act (S. Rep. No. 3797, 59th Cong., 1st Sess. (1906); H.R. Rep. No. 2224, 59th Cong., 1st Sess. (1906); 40 Cong. Rec. 7331 (1906)) indicates only that the preservation of Indian ruins was one important goal of the Act. In light of the broader language of the Act, however, it

would be unwarranted to assume that Congress intended to exclude reservation of areas containing other objects of scientific interest and this Court has so held.

In *Cameron* v. *United States*, 252 U.S. 450, petitioner sought to sustain his mining claims within the Grand Canyon by, among other things, attacking the President's authority under the Antiquities Act to establish the Grand Canyon National Monument. The Court rejected the argument, stating (252 U.S. at 455–456):

> The defendants insist that the monument reserve should be disregarded on the ground that there was no authority for its creation. To this we cannot assent. The act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific interest."

The same is true of Devil's Hole.[34]

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[34] Moreover, since the Antiquities Act was passed, Presidents over the years have reserved many sites as national monuments that do not contain Indian ruins, including, in addition to portions of the Grand Canyon, Dinosaur National Monument in Colorado and Utah; Rainbow Bridge National Monument in Utah; and Saguaro National Monument, Arizona. For a listing of national monuments established by presidential proclamations under the Antiquities Act, see annotation, after 16 U.S.C. 431. This long standing and consistent interpretation of the Antiquities Act by the officers charged with its administration is entitiled to great weight. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60; *Udall* v. *Tallman*, 380 U.S. 1, 16.

B. THE PRESIDENTIAL PROCLAMATION RESERVING DEVIL'S HOLE RESERVED THE WATER RIGHTS NECESSARY TO PRESERVE THE POOL AND THE FISH THAT LIVE IN IT

Both petitioners argue (Cappaerts Br. 57–64; Nevada Br. 21–24) that the President, in reserving Devil's Hole, did not intend to reserve water rights. There is no support for this contention. The obvious purpose of the Monument was, as the district court found (Finding 9, App. 362), "the preservation of the pool of water and the preservation of the Devil's Hole pupfish (*Cyprinodon diabolis*) which live therein." Petitioners' contention that the Proclamation emphasizes "the pool" rather than the fish that live in it (Cappaert Br. 56–64) ignores that the preservation of the pool in its natural state will also preserve the fish. The wording of the proclamation shows that both the pool, and the fish that made it significant, were purposes of the reservation. Indeed, it is difficult to think of a reservation that would more clearly carry with it a reservation of water rights.[35]

[35] The Cappaerts (Br. 62–64) argue that certain persons urged government officers to use a "travertine limestone formation" as a pretext for reserving Devil's Hole (Br. 62–64) and therefore the proclamation should not be construed so as to protect the fish. This argument must be rejected because (1) the evidence cited is hearsay, as to which the district court properly sustained a hearsay objection (App. 132); (2) the evidence shows only what private individuals urged the government to do—it does not show what government officers actually did; and (3) if federal officers ever had considered using the "travertine formation" as a pretext for saving the pupfish, they obviously dropped those plans for, while the pupfish are prominently mentioned in the proclamation, the proclamation is devoid of any mention of a "travertine formation."

Moreover, the proclamation placed the Monument under the authority of the Director of the National Park Service "as provided in the [National Park Service Act of] August 25, 1916 (39 Stat. 535; 16 U.S.C. 1–3)". That Act provides that the "fundamental purpose" of all national parks and monuments is "* * * to conserve the scenery and the natural and historic objects and *the wildlife therein* and to provide for the enjoyment of the same in such manner and by such means *as will leave them unimpaired for the enjoyment of future generations.*" (16 U.S.C. 1; emphasis added.) Needless to say, this "fundamental purpose" cannot be achieved in respect to Devil's Hole unless the pupfish have such water as is required for their continuing survival. In other words, the waters are necessary to accomplish the "fundamental purpose" for which the federal land was reserved and, as previously noted, it is precisely this element that gives rise to an implied federal reserved water right.[36]

IV

THE DEFENSE OF RES JUDICATA CANNOT BE INVOKED TO BAR THE ACTION BY THE UNITED STATES IN THIS CASE

Both petitioners contend (Cappaerts Br. 83–89; Nevada Br. 42–47) that because in December 1970 the State Engineer granted the Cappaerts certain

[36] The Cappaerts argue (Br. 77–79) that if the United States desired to protect the pupfish it should have obtained water rights by condemnation. But, so far as the record shows, there were no rights to condemn in 1952. The Cappaerts' pumping at issue here, the only diversion interfering with the federal right, did not begin until 1968 (see p. 7, *supra*).

pumping permits over the protest of the National Park Service this action is barred by *res judicata* or collateral estoppel.

Under Rule 8(c) of the Federal Rules of Civil Procedure, *res judicata* and collateral estoppel "are affirmative defenses that must be pleaded" in the answer. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 350. Although failure to plead this affirmative defense can result in its being waived,[37] neither the Cappaerts nor Nevada invoked *res judicata* in their answers (App. 15–20). The district court's findings of fact and conclusions of law (App. 359–368) do not mention *res judicata,* the Cappaerts did not brief the point on appeal and it is not one of the questions presented in their petition for a writ of certiorari. Accordingly, the Cappaerts have waived this defense and should not be permitted to raise it in this Court.

Intervenor Nevada, as stated above, also failed to plead the affirmative defense of *res judicata* or collateral estoppel in its answer, although the State did press these arguments on appeal[38] and did allude to them in their trial brief (R. 350–351). Moreover, as between Nevada and the United States, the State can hardly claim *res judicata* or collateral estoppel as a defense to the suit. The State was not a party to the permit proceeding and it was in no way in privity with the Cappaerts, who have waived this defense. In

[37] See James, *Civil Procedure* § 4.9 (1965).

[38] The court of appeals rejected Nevada's arguments in this regard on the merits (Pet. App. A–13—A–16).

these circumstances, neither *res judicata* nor collateral estoppel may be raised. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation, supra,* 402 U.S. at 320–326; *Bernhard* v. *Bank of America Nat. Trust & Savings Ass'n,* 19 Cal. 2d 807, 122 P. 2d 892 (Sup. Ct.)

Moreover, petitioners' *res judicata* defense is plainly inapplicable to two of the eight wells involved in this case. Petitioners argue that the State Engineer's granting of the Cappaerts' applications for permits to pump water from certain wells in December 1970 precluded the United States from later seeking to restrict such pumping. Regardless of the merits of petitioners' argument, which we discuss below, two of the wells (Well Nos. 16 and 17) [39] were not involved in that proceeding (App. 209, 279–280). At the time the case was tried in the district court, no permit had been issued in regard to Well No. 16 (App. 209) and although a permit apparently was issued at some time for Well No. 17 (*ibid*), the proceedings (if any) before the State Engineer with respect to that permit application are not in evidence. In addition, the district court's injunction applies not only to those wells (Wells Nos. 16 and 17) and the ones involved in the 1970 proceeding before the State Engineer (Well Nos. 1, 2, 3, 4, 5 and 6), but also to future withdrawals of water from certain areas of the Cappaerts' land to the extent this interferes with the government's reserved right (App. 368)—areas that, of course, were not the subject of

[39] These wells were not put in until January 1972 (App. 260).

the 1970 proceedings since the court's order refers to future wells and permit applications (App. 364, 368).

In any event, contrary to petitioners' contentions, the proceedings before the State Engineer did not bar the United States from seeking an injunction in federal court to restrict the Cappaerts' pumping of water, which interfered with the government's reserved water right at Devil's Hole and threatened the existence of the pupfish living there. While the application of principles of *res judicata* to administrative proceedings is uncertain,[40] at a minimum the defense cannot be successfully invoked unless "the issue decided in the prior adjudication [was] identical with the one presented in the action in question." *Bernhard* v. *Bank of America Nat. Trust & Savings Ass'n, supra,* 19 Cal. 2d at 813, 122 P. 2d at 895, quoted in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation, supra,* 402 U.S. at 323; see also ALI, Restatement of *Judgments,* Sections 1, 72 (1942). It is therefore necessary to examine the precise nature of the proceedings before the State Engineer in this case.

The State Engineer is, by statute, required to be a registered professional engineer trained in hydraulic and general engineering. Nev. Rev. Stat. 532.030. Before a person may withdraw public waters, he must obtain a permit from the State Engineer.[41] Nev. Rev.

[40] See 2 Davis, *Administrative Law Treatise*, Sections 18.01–18.12 (1958).

[41] Nevada law requires a three-stage process for perfecting water rights; (1) a person must apply for and obtain a permit from the State Engineer to appropriate water, Nev. Rev. Stat. 533.325 and 534.050. Any "interested person" may file a written protest against the granting of the application. Nev. Rev. Stat. 533.365.

This relatively simple procedure for authorizing new diversions is in contrast to the more formal procedure for adjudications of relative water rights among competing claimants. See Nev. Rev. Stat. 533.090–533.320, 534.100. Significantly, under the adjudicatory procedure, the State Engineer is required to make an initial determination of the relative rights of competing water claimants which he then must file in state court where it is subject to review. Nev. Rev. Stat. 533.450. While a full adjudicatory procedure, after a court decree, may constitute *res judicata,* petitioners have not cited, nor have we been able to find, any Nevada case holding that the State Engineer's decision to issue permits to appropriate waters, such as those at issue here, constitutes an adjudication of water rights binding upon the protestant.

Moreover, there are compelling reasons why the proceeding held here should not be *res judicata* in regard

Stat. 533.325–533.375; (2) after receiving his permit, he must begin and complete his water system within the time limits specified in the permit and submit proofs to the State Engineer, Nev. Rev. Stat. 533.380–533.420; (3) if the State Engineer determines that all of the requirements of state law are met, he will issue a certificate of appropriation which must be filed with the county recorder, Nev. Rev. Stat. 533.425. The record here shows only that the Cappaerts obtained certain permits from the State Engineer; the Cappaerts have never demonstrated that they perfected any water rights under Nevada law. See App. 226–227.

to the reserved water rights of the United States. (See, also, in this regard, the Brief of the State of California as *amicus curiae,* at pp. 13–15.) First, by statute the State Engineer's granting of a pumping permit is expressly made "subject to existing rights" (Nev. Rev. Stat. 533.430) and when the State Engineer granted the Cappaerts' permit applications in 1970 he stated that "the applications will be issued subject to existing rights * * *" (App. 312). This is a firm indication that the reserved rights of the United States were not, indeed could not be, determined by the proceedings before the State Engineer and that the government's federal action to determine whether it had "existing rights" was not barred.

Beyond this, the nature of the National Park Service's protests precludes treating the State Engineer's determination as *res judicata* in regard to federal reserved rights at Devil's Hole. The Park Service requested the State Engineer to deny outright or postpone granting the Cappaerts' applications pending completion of hydrologic studies of the area to determine the effect of pumping on the water level at Devil's Hole (App. 286–294). The field solicitor of the Department of Interior candidly admitted that the reports that had already been completed "tend mostly to indicate the need for further studies. These reports indicate that the precise data is not available at the present time and that is why we are urging most strongly that you withhold action until the other reports are completed which will be of a highly technical and ac-

ceptable nature" (App. 295).[42] It was only after the studies were completed and showed the deleterious effect on Devil's Hole of the Cappaerts' pumping that this suit was instituted.

In this situation, the State Engineer's granting of the Cappaerts' applications could not have amounted to a determination that the United States had no reserved rights in regard to Devil's Hole. The National Park Service did not litigate that question but asked only for more time to complete further studies that were needed to determine the effect of the Cappaerts' pumping. The State Engineer merely refused to postpone acting on the applications and the Cappaerts' counsel himself pointed out that the studies "will go forward whether or not the applications are granted; so let's not make the mistake of thinking that if these applications are granted the studies are moot, they are not" (App. 307).[43]

The situation here is thus not one in which the "administrative agency is acting in a judicial capaci-

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[42] The Cappaerts' attorney characterized the Park Service's position as (App. 298): "We want to protest but we have not established and don't have the grounds upon which we can protest and we would like some more time to develop that ground. If we don't, fine, then you can grant the application justified on the basis of the presently existing study which has been proposed."

[43] The only reference by the State Engineer to a federal reserved water right at Devil's Hole occurred at App. 310, when he stated that *the Cappaerts' attorney* had mentioned a "federal water right." But, the State Engineer continued, "[t]here is no record of a water right on Devil's Hole" and therefore he declined to consider further what effect granting the applications would have on such a right.

ty," *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 422, and in which the issue involved in the present case is one that was or could have been fully litigated in the prior administrative proceeding. Indeed, even if that were the situation, the courts have often refused to allow a *res judicata* defense to bar a public interest;[44] and prevention of the extermination of the Devil's Hole pupfish is plainly in the public interest, as President Truman's proclamation indicates. As Mr. Justice Black stated for the Court (in a judicial rather than an administrative context) in *United States* v. *California*, 332 U.S. 19, 40:

> The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

In sum, this is a suit within the jurisdiction of the federal courts under 28 U.S.C. 1345 and the United States has properly invoked the jurisdiction of its court to determine a question of federal law; no issues of state law are involved and the suit is not one to review the action of a state administration agency; the federal reserved water rights involved here were not—and could not appropriately have been—litigated

[44] See 2 Davis, *supra*, at Section 18.03.

in the proceedings before the State Engineer; and the State Engineer's decision in 1970 to issue permits for six of the eight wells that are now subject to the district court's injunction did not bar, under applicable principles of *res judicata* and collateral estoppel, the United States from bringing this suit to prevent extermination of the Devil's Hole pupfish.

It was entirely proper for the field solicitor to make his presentation to the State Engineer in order to direct attention to the probable effect of the increased pumping. This was cooperative and responsible behavior by a public servant and when the State Engineer issued the permits despite the protest, it was equally responsible for the United States to wait until the actual effect of the pumping could be isolated and proved, and then to bring this suit in federal court seeking recognition of its federally created water right and an injunction of the Cappaerts' pumping to the extent necessary to protect the national monument.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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